No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LAKENTO BRIAN SMITH, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Dated: July 30, 2020

Kenneth P. Tableman P27890
Kenneth P. Tableman, P.C.
Attorney for Petitioner
161 Ottawa Avenue, NW, Suite 404
Grand Rapids, MI 49503-2701
(616) 233-0455
tablemank@sbcglobal.net

QUESTION PRESENTED

The First Step Act changed the penalty for petitioner's crack cocaine crimes from life in prison to 10 years to life and changed petitioner's guideline range from life to 360 months to life. Petitioner moved to reduce his sentence under the First Step Act. Should the district court have held a hearing to consider petitioner's post-sentencing conduct and any other arguments before ruling on the motion?

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Western District of Michigan and the United States Court of Appeals for the Sixth Circuit:

- United States of America v. Smith, 958 F.3d 494 (6th Cir. 2020)
- United States of America v. Smith, No. 1:06-cr-32 (W.D. Mich. June 19, 2019)
- In Re: Smith, No. 17-1776 (6th Cir. 2019) (denying authorization to file second or subsequent motion to vacate under 28 U.S.C. § 2255)
- In Re: Smith, No. 16-1664/1703(6th Cir. 2016) (denying authorization to file second or subsequent motion to vacate under 28 U.S.C. § 2255)
- Smith v. United States, 1:13-CV-302, 2013 WL 30190662 (W.D. Mich. July 11, 2013) (denying motion under 28 U.S.C. § 2255)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Lakento Brian Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was published as United States v. Smith, 958 F.3d 494 (6th Cir. 2020) (Pet. App. 1a).

JURISDICTION

The Sixth Circuit's opinion was filed on May 6, 2020. There was no petition for rehearing. The Sixth Circuit's mandate issued on May 28, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 404 of the First Step Act of 2018, Pub. L. No. 115-391; 132 Stat. 5194 and 18 U.S.C. § 3582(c)(1)(B). These statutory provisions are reproduced in the Appendix, infra, Pet. App. 12a–14a.

Section 404 of the First Step Act allows the district courts to revisit sentences for crack cocaine convictions for which defendants have not received the benefit of the Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat.

2372 (2010).[1] That Act had increased the quantity of crack cocaine necessary to trigger various mandatory minimum penalties, but was not retroactive. The First Step Act made it retroactive.

18 U.S.C. § 3582(c)(1)(B) allows courts to change previously imposed sentences in some circumstances.

STATEMENT OF THE CASE

In 2006, a jury convicted Smith of four charges, two of which involved crack cocaine. Count 1 charged him with conspiracy to distribute or possess with intent to distribute 50 grams or more of crack cocaine; Count 2 charged possession with intent to distribute crack cocaine; Count 3 charged possession with intent to distribute cocaine; and Count 4 charged felon-in-possession of one or more firearms. The jury found that 50 grams or more of crack cocaine was involved in Counts 1 and 2. (Verdict Form, R. 64, Page ID # 347–48).

Because Smith had two felony drug convictions and the government filed a notice of prior convictions, the law required the district court to sentence Smith to serve life in prison for his convictions on Counts 1 and 2. 21 U.S.C. § 841(b)(1)(A)(1986) (amended December 21, 2018) (Information, R. 26, Page ID # 40–42). The district court also sentenced Smith to serve 360 months on Count 3 and 120 months on Count 4, with all the sentences to run

[1] The Fair Sentencing Act applies to crack cocaine offenders sentenced on or after August 3, 2010. Dorsey v. United States, 567 U.S. 260 (2012).

concurrently. (Judgment, R. 75, Page ID # 889).

Smith's drug convictions also made him a career offender under the sentencing guidelines. See U.S. Sentencing Guidelines Manual §§ 4B1.1 and 4B1.2 (U.S. Sentencing Comm'n 2018). His guideline sentencing ranges were life for Counts 1 and 2; 360 months to life for Count 3; and 120 months for Count 4. (Presentence Investigation Report ("PSR"), R. 88, pp. 27, 58, Page ID # 930, 932).[2]

Smith appealed. His convictions were affirmed. He also filed various post-sentencing motions. All were denied without granting him any relief. See United States v. Smith, 958 F.3d 494 (describing history).

Following the enactment of the First Step Act, Smith filed a pro se motion for resentencing. He asked the district court to reduce his sentence to time served. (Motion, R. 99, Page ID # 978–986). Because his original sentencing judge had retired, a different judge was assigned to rule on the motion.

The court appointed counsel. Counsel filed a memorandum asking the court to order a report from the probation department about Smith's post-sentencing record and to allow Smith to speak to the court. (Mem. in Support

[2]The PSR said that his guideline range was 240 months for Count 4, but this was wrong. The maximum penalty for a conviction of felon-in-possession of a firearm is 10 years, so the correct guideline range was 120 months. See 18 U.S.C. § 924(a)(2).

of Motion, R. 101, Page ID # 91–92).

The First Step Act changed Smith's guideline sentencing range for Counts 1 and 2 from life to 360 months to life. It changed his statutory penalty on those Counts from life to 10 years to life. It did not change the penalties for Counts 3 and 4.

The government conceded that Smith was eligible for the district court to consider reducing his sentence. The government argued, however, that no hearing was required. (Gov't Response, R. 102, Page ID # 997-1002).

The district court did not hold a hearing. Instead it entered a two-page order on Form AO 247 granting Smith's motion and reducing his sentence to 360 months on Counts 1 and 2 concurrent with each other and with the other counts which were unchanged. (Order, R. 104, page ID # 1006, Non-Public Disclosure, R. 105 Page ID # 1007).

Smith appealed.

He argued that the district court should have revisited the entire sentencing package, that the court should have held a hearing, and that the district court's form order granting the motion for sentence reduction failed to adequately explain the district court's decision. The Sixth Circuit, however, rejected his appeal and affirmed his sentence. The Court said that because the First Step Act only granted the district court limited authority to impose

a reduced sentence it did not require a plenary resentencing proceeding. In addition, the court held that the form order sufficiently explained the district court's decision. United States v. Smith, 958 F.3d 494 (6th Cir. 2020).

Smith now seeks a writ of certiorari from this Court to review the decision of the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition to make clear that a defendant eligible to have his mandatory sentence of life in prison set aside under the First Step Act should have a full resentencing hearing.

When deciding if it will grant a petition for certiorari the Court considers if the petition presents an important issue "that has not been, but should be, settled by [the] Court" or if the decision conflicts with the decision of another circuit court "on the same important matter." Sup. Ct. R. 10(a).

Hundreds, if not thousands, of federal prisoners are situated like Smith. Their sentences for crack cocaine offenses were imposed before August 3, 2010. Now the First Step Act gives them the right to seek relief in the district court.[3] This Court has not yet addressed the right of a movant under the First Step Act to have a full sentencing hearing, and the circuits

[3]Through July 31, 2019, courts had granted 1,674 motions to reduce sentences under § 404 of the First Step Act. U.S. Sentencing Commission, First Step Act of 2018 Resentencing Provisions, Retroactivity Data Report, p. 4 (August 2019).

are split. United States v. Kelley, 962 F.3d 470 (9th Cir. 2020).

Several circuit courts have said that a defendant does not have the right to an in-person plenary resentencing under the First Step Act. United States v. Hegwood, 934 F.3d 414 (5th Cir. 2019) (stating that the Act's reference to the Fair Sentencing Act, only, limited the authority of district courts to change sentences and did not authorize a plenary sentencing proceeding), United States v. Alexander, 951 F.3d 706, 708 (6th Cir. 2020), United States v. Hamilton, 790 Fed. App'x 824, 826 (7th Cir. 2020) ("Because the Act gives district courts discretion to reduce a sentence and does not mention a hearing, it does not require district courts to hold a hearing."), United States v. Williams, 943 F.3d 841, 843 (8th Cir. 2019 (same).[4]

These courts reason that a proceeding under the First Step Act is a modification of a sentence authorized by 18 U.S.C. § 3582(c). That section provides limited exceptions to the general rule that a court cannot modify a

---

[4]The non-hearing approach creates some practical problems. Because First Step Act cases concern sentences imposed before August 3, 2010, in many cases the original sentencing judge has left the bench. A successor judge has to make the decision. In addition, defendants lacked any incentive to develop mitigating arguments or guideline arguments at their original sentencing when they faced a severe mandatory minimum penalty. United States v. King, 423 F. Supp.3d 481, 488–89 (M.D. Tenn. 2019), United States v. Rose, 379 F. Supp.3d 227, 233–36 (S.D.N.Y. 2019) (noting the difficulties with having a successor judge reconsider a sentencing and stating "a frozen-in-time approach would require a district court to exercise discretion based on a record that was not created with the current statutory framework in mind." Id., at 235).

sentence once it has been imposed. It allows modification if "otherwise expressly permitted by statute or by Rule 35 of the Federal Rule of Criminal Procedure[.]" 18 U.S.C. § 3582(c)(1)(B). In Hegwood, the court held that the Act was a limited discretionary authorization and that Congress did not intend courts to apply other changes, like changes in the career offender guidelines. United States v. Hegwood, 934 F.3d at 418.

In Alexander, the court agreed with Hegwood and also pointed to Federal Rule of Criminal Procedure 43(b)(4), which says that a defendant need not be present if "[t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)." United States v. Alexander, 951 F.3d at 708. This contrasts with Rule 43(a), which says that "the defendant must be present at . . . sentencing." Fed. R. Crim. P. 43(a).

These courts read the Act too narrowly. A broader reading of the Act is more consistent with the purposes of the Act.

The First Step Act was enacted to correct unfair sentences given to offenders convicted of crack cocaine offenses. United States v. Simons, 375 F. Supp. 3d 379 (E.D.N.Y. 2019). Congress originally set the mandatory minimum penalties for crack cocaine offenses at a ratio of 100-to-1 compared to powder cocaine penalties. Over time research showed that the relative harm between crack cocaine and powder cocaine was not as severe as 100-to-

1, that the penalties resulted in treating like offenders differently, and that the penalties disproportionately affected African-American defendants. In response, Congress changed the law. First, in 2010, Congress enacted the Fair Sentencing Act, Public Law No. 111-220, 124 Stat. 2372, and reduced the amount of crack cocaine required for mandatory minimum penalties. Dorsey v. United States, 567 U.S. at 268–69. But this change was not made retroactive. Then, in 2018, Congress made the change retroactive by enacting the First Step Act.

Under the Act, sentencing courts "that imposed a sentence for a covered offense may . . . impose a reduced sentence as if Sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." First Step Act § 404(b). The Act does not require courts to reduce sentences. That grant of discretion and the use of the word impose suggests a broader view of the case and permits courts to correct other errors and to consider the 18 U.S.C. § 3553(a) sentencing factors, as well as to impose a sentence that varies from the guidelines range. United States v. Chambers, 956 F.3d 667, 672–73 (4th Cir. 2020). This approach calls for a plenary resentencing.

Rule 43(b)(4) does not require a different reading of the Act. This part of the rule comes from an amendment in 1998 that was intended to clarify the

right of a defendant to appear at proceedings conducted under Federal Rule of Criminal Procedure 35 and the right to appear at resentencing hearings conducted under 18 U.S.C. § 3582(c). As written in 1998, 18 U.S.C. § 3582(c) covered retroactive changes to the sentencing guidelines by the United States Sentencing Commission or motions filed by the Bureau of Prisons to reduce a sentence based on "extraordinary and compelling reasons." Rule 35 covered corrections made to fix typographical or clerical errors (Rule 35(a)) and motions made by the government to reward a defendant based on substantial assistance (Rule 35(b)). See Fed. R. Crim. P. 43, advisory committee's notes to 1998 amendments.

It is too broad a reading of Rule 43(b)(4) to say that it precludes a plenary resentencing when applying the First Step Act. All the rule says is that a resentencing is not required in some circumstances. And it was adopted long before the Act.

In addition, the Act makes resort to Rule 43(b)(4) unnecessary. It affects statutory penalty ranges, as well as guideline calculations. District courts have independent authority under § 404(b) of the Act to impose a reduced sentence. This authorization is distinct from, although complementary to, the authorization given courts in 18 U.S.C. § 3582(c)(1)(B). United States v. Luna, Case No. 3:05-cr-58, 2020 U.S. Dist. LEXIS 14545 at *

15–16 (D. Conn. January 29, 2020) (collecting cases).

When imposing a sentence in response to a motion under the First Step Act courts are doing more than correcting the sentence. A district court corrects a defendant's sentence when its action is arithmetical, technical, or mechanical. See Fed. R. Crim. P. 35(a), United States v. Flack, 941 F.3d 238, 241 (6th Cir. 2019). A district court resentences a defendant when it revisits the § 3553(a) factors and determines anew what the sentence should be. So there is a distinction between a resentencing and a correction of sentence. (Id.)

Courts and the Sentencing Commission have said that the familiar § 3553(a) factors should guide the district court's discretion when responding to a First Step Act motion. United States v. Allen, 956 F.3d 355 (6th Cir. 2020), United States v. King, 423 F. Supp.3d at 488–89, United States v. Rose, 379 F. Supp.3d at 231, 234. Post-sentencing conduct is one such factor. Pepper v. United States, 562 U.S. 476, 487–93 (2011). That means that courts may consider how a defendant has done since sentencing when considering a motion to reduce a previously imposed sentence that invokes the First Step Act. United States v. Allen, 956 F.3d 355 (6th Cir. 2020).

Thus, a motion under the First Step Act requires a process more like a sentencing than like a correction of an error. The court must recalculate the

statutory penalty and the sentencing guideline range and then consider the § 3553(a) factors. Flack involved proceedings under 28 U.S.C. § 2255, but the same reasoning should apply under the First Step Act. In both § 2255 and First Step Act proceedings the district court may reevaluate the appropriateness of the defendant's original sentence. In both proceedings the court revisits the § 3553(a) factors. This exercise of discretion makes the proceeding a sentencing, not just a correction of a mistake.

The sentencing court can best exercise its discretion by holding a hearing where the defendant is present and can argue in favor of the reduced sentence he seeks. United States v. King, 423 F. Supp.3d at 492.

CONCLUSION

Lakento Smith never got the chance to tell the district court what he thought was important when considering his motion to modify his sentence. The record does not reveal that the district court even considered Smith's post-sentencing conduct. Moreover, the right to speak to the court at sentencing, while not constitutionally compelled, nonetheless is an important and long-standing right because "[t]he most persuasive counsel may not be able to speak for a defendant as a defendant might, with halting eloquence, speak for himself." Green v. United States, 365 U.S. 301, 304 (1961).

The public legitimacy of the criminal justice system relies on fair

sentencing procedures. Cf. Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907–08 (2018). It is unfair to deny an offender the chance to come to court in person and plead his case.

Here, a district judge who replaced the original sentencing judge decided Smith's motion without hearing Smith say why he deserved a sentence of time served and without considering Smith's post-sentencing conduct. The Court should instruct district courts that a motion to modify a sentence under the First Step Act calls for a full hearing when the defendant was previously sentenced to life in prison, at least when the defendant wants a hearing. This important issue merits consideration by the Court.

The Court should also make clear that the district court should revisit the entire sentencing package in cases like Smith's.

The Court should grant the petition for certiorari, vacate Smith's sentences, and remand the case for a resentencing hearing at which Smith can appear in person to argue for the sentence he seeks.

Dated: July 30, 2020

Respectfully submitted,

Kenneth P. Tableman
Kenneth P. Tableman, P.C.
Attorney for Petitioner
161 Ottawa Avenue, NW, Suite 404
Grand Rapids, MI 49503-2701
(616) 233-0455
tablemank@sbcglobal.net

APPENDIX CONTENTS